STATE OF MICHIGAN

COURT OF APPEALS

ROBERT O'BRIANT and PAMELA O'BRIANT, Plaintiffs-Appellants, v ROLLINS, INC., and ORKIN EXTERMINATING COMPANY, INC., Defendants-Appellees.	UNPUBLISHED June 15, 2001 No. 217035 Genesee Circuit Court LC No. 97-055796-CZ

Before: Hoekstra, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) in defendants' favor. We affirm.

This case arises from the unsuccessful treatment of the termite problem in plaintiffs' house. Plaintiffs[1] contracted with defendant Orkin Exterminating Company, Inc.,[2] to eradicate termites that plaintiffs had discovered in their home. Although defendant Orkin attempted to address the problem for approximately two years, the termites were not eliminated. Thereafter, plaintiffs filed the instant lawsuit, including claims for violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.*, for negligence, and for breach of a written warranty. Defendants moved for summary disposition and the trial court granted their motion.

Plaintiffs argue on appeal that the trial court erred in granting defendants' motion for summary disposition on all three of their claims. We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201

[1] Although plaintiff Robert O'Briant is the only plaintiff that signed the written contract, throughout their briefs the parties argue in terms of "plaintiffs" and, for ease in reference, we will refer to the parties in the same manner.

[2] Plaintiffs' allegations primarily concern defendant Orkin Exterminating Company, Inc., which is a subsidiary of Rollins, Inc., and for ease in reference the two entities will be referred to as defendants throughout this opinion.

(1998); *Russell v Dep't of Corrections*, 234 Mich App 135, 136; 592 NW2d 125 (1999). In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion" to determine whether a genuine issue regarding any material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the nonmoving party fails to present evidentiary proofs showing a genuine issue of material fact for trial, summary disposition is properly granted. *Debra Smith v Globe Life Ins Co*, 460 Mich 446, 455-456, n 2; 597 NW2d 28 (1999).

First, plaintiffs argue that the trial court erred in granting summary disposition in favor of defendants with regard to plaintiffs claim under the MCPA, MCL 445.901 *et seq.*; MSA 19.418(1) *et seq*. Although not entirely clear, it appears that plaintiffs are arguing that the limitations-of-remedies provision in the contract cannot be applied to bar plaintiffs' claims under the MCPA because that act was adopted as a remedial act to address the type of problems that occurred in this case.

To the extent that the trial court can be understood to rely on the contract as a basis to conclude that defendants did not violate the MCPA, we would agree with plaintiffs that the contract itself cannot protect defendants from a claim of violation of the MCPA. Nevertheless, plaintiffs failed to show that a genuine issue of material fact existed with regard to the MCPA. Contrary to plaintiffs' assertion that they "are under no obligation to 'plug in' the numerous facts in this case to each unfair or deceptive method, act or practice allegedly committed by [d]efendants," MCR 2.116(G)(4) provides in relevant part:

> When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not respond, judgment, if appropriate, shall be entered against him or her.

A "mere promise" that a "claim might be supported by evidence produced at trial" is insufficient to withstand a motion for summary disposition. *Maiden, supra* at 121.

Upon review of the record in the present case, we find that most of the subsections of the MCPA that plaintiffs cite clearly do not apply to the facts and circumstances here. The only subsection that may apply to plaintiffs' case, subsection (1)(y), concerning gross discrepancies between the representations made by the seller and those actually reduced to writing, or the failure of the other party to provide the promised benefits, is not supported by the record. The only factual support plaintiffs provide are simply examples of typical sales "puffery." We agree with the trial court that where the contract provides a three day window for terminating, it is not reasonable for the buyer to rely on sales puffery or other statements that may be contained in a written brochure. Because plaintiffs have failed to present evidentiary proofs creating a genuine issue of material fact for trial, summary disposition was appropriate. *Maiden, supra* at 120; *Debra Smith, supra* at 455-456, n 2.

Next, plaintiffs argue that they stated a claim for negligence that was independent of any duties that defendants owed them under the terms of their agreement. This claim must fail because defendants' limitations-on-damages provision of the parties' agreement is enforceable.

Where a document is unambiguous and unequivocal, its construction can be decided by the court as a matter of law. *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 706; 532 NW2d 186 (1995), overruled in part on other grounds in *Debra Smith, supra*. Even where the parties' respective bargaining power differs, if the terms of an agreement are reasonable, those terms will be enforced. *St Paul Fire & Marine Ins Co v Guardian Alarm Co of Michigan*, 115 Mich App 278, 283-284; 320 NW2d 244 (1982).

Here, plaintiffs elected to purchase defendants' "Limited Lifetime Renewable Subterranean Re-Treatment Guarantee".[3] This contract clause limiting remedies to retreatment only and releasing defendants from any further liability is clear and unambiguous and thereby enforceable. *Osman, supra*; *St Paul Fire & Marine Ins Co, supra* at 283-285; accord *Groth v Orkin Exterminating Co, Inc*, 909 F Supp 1150, 1152-1153 (CD Ill, 1995), citing *Palmer v Orkin Exterminating Co, Inc*, 871 F Supp 912, 913 (SD Miss, 1994), aff'd 71 F3d 875 (CA 5, 1995), *Sidney Smith v Orkin Exterminating Co, Inc*, 791 F Supp 1137, 1141-1142 (SD Miss, 1990), aff'd 943 F2d 1314 (CA 5, 1991), and *Johnson v Orkin Exterminating Co, Inc*, 746 F Supp 627, 628-631 (ED La, 1990). Likewise, plaintiffs cannot avoid the terms of the contract on the basis

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[3] That guarantee provides as follows:

> Subject to the limitations and restrictions set forth in this Agreement, specifically including the General Terms and Conditions below, ORKIN will issue to me a Re-Treatment Guarantee which obligates ORKIN, at no extra cost to me, to apply any necessary additional treatment to my building if an infestation of Subterranean Termites is found during the effective period of my Guarantee. I understand that ORKIN's obligation under this Guarantee is limited to re-treatment only. I expressly release ORKIN from any obligations to repair any damage to my building or its contents caused by an infestation of Subterranean Termites or caused by ORKIN's negligence or breach of any other obligations arising hereunder. . . .

In addition to the above clause, the parties' agreement contained the following integration clause:

> (c) I understand that this contract, the attached inspection/treating report, if issued and the wooden floor removal agreement, if any, all together make up my complete agreement with Orkin and that this agreement may not be changed in any way by any representative of Orkin or me unless it is changed in writing and signed by a corporate officer of Orkin Exterminating Company, Inc. I have had no representations or inducements made to me except what is written in this agreement and Orkin and I will be bound only by its written terms. [Uppercase in original document changed to lowercase.]

of their failure to read the agreement. *Dombrowski v City of Omer*, 199 Mich App 705, 710; 502 NW2d 707 (1993), quoting *Paterek v 6600 Limited*, 186 Mich App 445, 450; 465 NW2d 342 (1990). Nor do the facts suggest that plaintiffs were forced or intentionally misled into entering the contract, thereby negating the agreement's application. *Dombrowski, supra* at 713, discussing *Paterek, supra* at 449.

Pursuant to the limitations-on-damages provision, plaintiffs are limited to retreatment as a remedy because they expressly waived any claims of negligence against defendants arising out of the services performed. See *Palmer, supra* at 914-915; *Sidney Smith, supra* at 1143-1144; *Johnson, supra* at 631-632. Notwithstanding the contractual remedy, plaintiffs fail to identify any duty of defendants independent of their contractual relationship. *Rinaldo's Const Corp v Michigan Bell Telephone Co*, 454 Mich 65, 83-85; 559 NW2d 647 (1997); *Dahlman v Oakland University*, 172 Mich App 502, 507; 432 NW2d 304 (1988).

Finally, plaintiffs argue that the trial court erred in granting summary disposition of their claims under the common law for breach of warranty. Because plaintiffs have not adequately explained their legal theory in support of warranties existing outside of the parties' agreement by citing to supporting authority regarding common law related warranties, this argument is waived. *In re Contempt of Barnett*, 233 Mich App 188, 191; 592 NW2d 431 (1998). Even if this Court were to rely on *Kelynack v Yamaha Motor Corp, USA*, 152 Mich App 105, 111, 115-116; 394 NW2d 17 (1986),[4] as plaintiffs urge, the limited guaranty in the parties' agreement still applies because plaintiffs have not shown that that remedy fails in its purpose or deprived them of the value of their bargain with defendants. See *Severn v Sperry Corp*, 212 Mich App 406, 413-414; 538 NW2d 50 (1995), discussing and applying *Kelynack, supra*.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Patrick M. Meter

[4] In *Kelynack, supra*, this Court held that under the Uniform Commercial Code, MCL 440.2719; MSA 19.2719, where an exclusive remedy provision of a warranty fails, it renders the limitation on damages provision of the agreement void. Plaintiffs concede that the UCC does not apply in the present case because their contract with defendants is for services, not goods.